PERKAYUAN OKS NO. 2 SDN. BHD

v.

KELANTAN STATE ECONOMIC DEVELOPMENT CORPN.

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD. EUSOFF BIN CHIN CJ
DATUK CHONG SIEW FAI FCJ
DATO' HJ. LAMIN BIN HJ. MOHD YUNUS PCA
[CIVIL APPEAL NO. 02-117 OF 1994]
24 FEBRUARY 1995

CONTRACT: *Agreement - True intention of parties - Principles of construction - Whether Court to look to substance of agreement - Whether Court to examine every provision of agreement - Preamble of agreement - Whether to be equally considered.*

CONTRACT: *Agreement - Effect of terms - Main agreement giving appellant logging rights but prohibited assignment of rights - Appellant passed over parts of rights to third party by separate agreement - Whether appellant guilty of breach - Whether there was assignment of appellant's rights - Second agreement - Whether in the nature of a sub-contract - Grant of assignment and contract for service - Whether to be distinguished.*

CONTRACT: *Agreement - Breaches - Termination notice - Sufficiency - Alleged breaches not specifically spelt out in notice - Whether vague - Whether notice bad - Whether agreement improperly terminated.*

The respondent was the donee of some 40,000 acres of timber concession in the State of Kelantan. By an agreement dated 24 December 1981 (the main agreement) the respondent granted the appellant the right to carry out logging activities on the said concession. Clause 18 of the agreement prohibited the appellant from assigning its rights therein without the respondent's consent, and clause 21 empowered the respondent to terminate the agreement upon breach of any of the terms thereof by the appellant.

On 24 May 1988 the appellant entered into an agreement with Syarikat Kempadang Sdn Bhd (the second agreement) and engaged the latter as its contractor to log out the concession area. By this agreement some of the appellant's responsibilities vis-a-vis the main agreement were passed over to and assumed by Kempadang. The appellant however retained the right to terminate the agreement should Kempadang fail to comply with the provisions of the agrement or that of the main agreement. This apart, Kempadang had also agreed to fell the timber subject to the reasonable satisfaction of the appellant and in conformity with the reasonable directions and requirements of the appellant.

The respondent took the second agreement as an assignment by the appellant of its rights in breach of clause 18, and consequently served a notice on the appellant to terminate the main agreement. *Inter alia*, the notice alleged that the appellant had "on various occasions assigned its rights under the main agreement to third parties without the written consent of the respondent in breach of clause 18 of the main agreement". On 12 December 1988 the main agreement was terminated by the respondent.

The appellant sued for performance of the main agreement. The learned Judge ruled that the the main agreement was properly rescinded as the appellant, by the second agreement, had entered into an assignment in clear breach of the said clause 18. The appellant appealed.

Before the Federal Court the primary issues that arose were:

1. Whether the notice of 26 October 1988 was a good notice.

2. Whether the second agreement was a grant of assignment and hence caught by clause 18 or whether it was a sub-contract excluded from the terms of that clause.

Held:

[1] The notice of 26 October was bad in law. By merely parrotting the language of clause 18 of the main agreement, and not giving any facts or particulars, the notice was clearly insufficient and inadequate. The phrase "various occasions" on which the appellant was alleged to have assigned or transferred its rights to the third parties lacked details as the identity of the third parties to whom the rights were allegedly assigned or transferred had not been properly particularised. As to the allegation that the appellant had made misrepresentation to the Menteri Besar of Kelantan in breach of the main agreement, there was not even the faintest suggestion as to how the misrepresentation came about or what in fact that was being misrepresented. Such a vague notice is no notice.

[2] The learned Judge's finding that the second agreement was a grant of assignment by the appellant to Kempadang was without adequate examination of the terms of the agreement. From the terms of the agreement, including the preamble thereof, it is clear that the appellant had agreed only to "engage" Kempadang. To "engage" is to employ or to secure for service. It is also clear that upon being engaged to do the work, Kempadang did not have a free hand to work the concession area. Kempadang must not only satisfy the appellant, but must also comply with all the directions and requirements issued by the appellant. To carry out the work with such conditions attached cannot be the result of an assignment.

[3] The second agreement was a sub-contract and not an assignment. The facts showed that the appellant had paid a security deposit of RM 80,000 to the respondent to secure the performance of the main agreement, about which there is no mention at all in the second agreement. With the security deposit still remaining in the name of the appellant, the implication is that the logging operations would continue to be in the name and accordingly the responsibility of the appellant. This apart, the effect of clause 12 of the second agreement would be that the agreement would continue to subsist for so long as the main agreement remained in force, and that should Kempadang commit a default under clause 10 thereof, its "employment" could summarily be terminated by the appellant. What this means is that the main agreement will continue to operate even when the second agreement has ceased to be in force but not vice versa. This is another indication that the logging operations were sub-contracted and not assigned to Kempadang. As a sub-contract is excluded from the terms of clause 18, the second agreement therefore has not breached that clause.

[Appeal allowed. Main agreement reinstated]

[**Bahasa Malaysia** Translation of Headnote]

***KONTRAK**: Perjanjian - Niat sebenar pihak-pihak - Prinsip-prinsip pentafsiran - Samada Mahkamah harus melihat kepada inti perjanjian - Samada Mahkamah harus meneliti setiap peruntukan perjanjian - Mukadimah perjanjian - Samada hendaklah dipertimbangkan secara setanding.*

***KONTRAK**: Perjanjian - Kesan terma-terma - Perjanjian utama memberi perayu hak-hak pembalakan tetapi melarang serahanhak hak-hak - Perayu menyerahkan sebahagian daripada hak-hak kepada pihak ketiga melalui perjanjian yang berasingan - Samada perayu bersalah atas kemungkiran - Samada terdapatnya penyerahan hak perayu -*

Perjanjian kedua - Samada ianya bersifat kontrak kecil - Serahanhak dan kontrak untuk perkhidmatan - Samada harus dibezakan.

***KONTRAK**: Perjanjian - Kemungkiran - Notis penamatan - Kecukupan - Kemungkiran-kemungkiran yang dikatakan tidak dinyatakan dengan khususnya dalam notis - Samada samar-samar - Samada notis tidak sempurna - Samada perjanjian ditamatkan dengan cara yang tidak wajar.*

Responden adalah penerima derma (donee) anggaran 40,000 ekar konsesi kayu balak dalam Negeri Kelantan. Melalui satu perjanjian bertarikh 24 Disenber 1981 (perjanjian utama) responden telah memberikan perayu hak untuk menjalankan aktiviti pembalakan ke atas konsesi tersebut. Fasal 18 perjanjian tersebut melarang perayu daripada menyerahhak hak-haknya tanpa kebenaran responden, dan fasal 12 memberi kuasa kepada responden untuk menamatkan perjanjian tersebut jika perayu memungkiri mana-mana terma didalamya.

Pada 24 Mei 1988 perayu telah memasuki satu perjanjian dengan Syarikat Kempadang Sdn. Bhd. (perjanjian kedua) dan telah mengambil syarikat tersebut sebagai kontraktornya untuk mengeluarkan kayu balak daripada kawasan konsesi tersebut. Melalui perjanjian ini beberapa daripada tanggungjawab perayu dalam perjanjian utama telah dialihkan kepada atau diambil oleh Kempadang. Perayu walau bagaimanapun mengekalkan hak untuk menamatkan perjanjian tersebut sekiranya Kempadang gagal untuk mematuhi peruntukan-peruntukan perjanjian tersebut atau perjanjian utama. Selain daripada ini, Kempadang telah juga bersetuju untuk membalak tertakluk kepada kepuasan perayu yang sewajarnya dan akan mematuhi arahan-arahan dan kehendak-kehendak perayu yang sewajarnya.

Responden menyifatkan perjanjian kedua tersebut sebagai satu serahanhak oleh perayu terhadap hak-haknya dan memungkiri fasal 18, dan berikutan itu telah menyampaikan satu notis terhadap perayu bagi menamatkan perjanjian utama tersebut. Antara lainnya, notis tersebut mengatakan bahawa perayu telah "pada beberapa waktu menyerahhak hak-haknya di bawah perjanjian utama tersebut kepada pihak-pihak ketiga tanpa kebenaran bertulis responden dalam memungkiri fasal 18 perjanjian utama tersebut". Pada 12 Disember 1988 perjanjian utama telah ditamatkan oleh responden.

Responden telah mendakwa untuk pelaksanaan perjanjian utama. Tuan Hakim yang bijaksana memutuskan bahawa perjanjian utama tersebut telah dibatalkan dengan sempurnanya kerana perayu, melalui perjanjian kedua tersebut, telah membuat serahanhak dan memungkiri dengan jelasnya fasal 18 tersebut.

Di hadapan Mahkamah Persekutuan isu-isu utama yang terbit adalah:

1. Samada notis bertarikh 26 Oktober 1988 adalah notis yang sempurna.
2. Samada perjanjian kedua merupakan satu serahanhak dan dengan itu terikat oleh fasal 18 atau sama ada ianya merupakan kontrak kecil yang terkeluar daripada terma-terma fasal tersebut.

Diputuskan:

[1] Notis bertarikh 26 Oktober tersebut adalah tidak sempurna menurut undang-undang. Dengan hanya menceduk bahasa dalam fasal 18 perjanjian utama, dan tidak memberikan apa-apa fakta atau butir-butir, notis tersebut adalah jelas tidak memadai dan tidak mencukupi. Ungkapan "various occasions" dimana perayu dikatakan telah menyerahhak atau memindahkan hak-haknya kepada pihak-pihak ketiga kekurangan butir-butir kerana pengenalan pihak-pihak ketiga tersebut 'kepada siapa hak-hak tersebut dikatakan telah diserahhak atau dipindahkan' telah tidak diturunkan butir-butirnya dengan betul. Berhubung dengan pengataan bahawa

perayu telah membuat salah nyataan kepada Menteri Besar Kelantan dan mengingkari perjanjian utama, tidak terdapat sedikit pun saranan bagaimana salah nyataan tersebut bermula atau apakah yang telah disalahnyatakan itu. Notis yang sebegitu samar-samar adalah tidak boleh dianggapkan notis yang sempurna.

[2] Keputusan Tuan Hakim yang bijaksana bahawa perjanjian kedua adalah merupakan pemberian penyerahhakan oleh perayu kepada Kempadang dibuat tanpa pemeriksaan yang sempurna terhadap terma-terma perjanjian tersebut. Daripada terma-terma perjanjian tersebut, termasuk mukadimahnya, ianya adalah jelas bahawa perayu telah bersetuju untuk hanya "engage" (mengguna-khidmat) Kempadang. Untuk mengguna-khidmat adalah untuk melantik atau mendapatkan perkhidmatan. Ianya adalah juga jelas bahawa setelah diambil untuk berkhidmat bagi menjalankan kerja-kerja tersebut, Kempadang tidak bebas untuk mengerjakan kawasan konsensi tersebut. Kempadang bukan sahaja harus memuaskan perayu tetapi juga mematuhi kesemua arahan dan kehendak-kehendak yang dikeluarkan oleh perayu.
Bagi menjalankan kerja-kerja tersebut dengan syarat-syarat yang sedemikian terikat padanya bukanlah hasil daripada satu serahanhak.

[**3]** Perjanjian kedua adalah satu kontrak kecil dan bukannya satu serahanhak. Fakta-fakta menunjukkan bahawa perayu telah membayar satu deposit jaminan sebanyak RM80,000 kepada responden untuk menjamin pelaksanaan perjanjian utama tersebut, berhubung dengan mana tidak terdapat apa-apa sebutan pun dalam perjanjian kedua. Dengan deposit jaminan kekal atas nama perayu, implikasinya adalah bahawa operasi pembalakan itu akan terus berada atas nama dan sehubungan itu tanggungjawab perayu. Selain itu, kesan fasal 12 perjanjian kedua adalah bahawa perjanjian tersebut akan terus berkuatkuasa sepanjang tempoh perjanjian utama kekal berkuatkuasa, dan sekiranya Kempadang melakukan kemungkiran di bawah fasal 10 di dalamnya, "perlantikan"nya boleh secara segera ditamatkan oleh perayu. Apa yang dimaksudkan adalah bahawa perjanjian utama tersebut akan terus beroperasi walaupun perjanjian kedua telah tidak lagi berkuatkuasa tetapi tidak sebaliknya. Ini adalah satu lagi petunjuk bahawa operasi pembalakan tersebut telah dikontrakkan (sub-contracted) dan tidak diserahhakan kepada Kempadang. Oleh kerana kontrak kecil adalah tidak termasuk dalam fasal 18, perjanjian kedua dengan itu telah tidak memungkiri fasal tersebut.

[Rayuan dibenarkan. Perjanjian utama dikekalkan semula]

Cases referred to:
State of Uttar Pradesh & Ors. v. Salig Ram Sharma AIR [1960] All 543 ***(refd)***
Sinha Govindji v. Deputy Controller of Imports [1962] 1 SCJ 93 ***(refd)***
Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd. [1988] 2 MLJ 226 ***(refd)***
Gregory v. Serle [1898] 1 Ch. 652 ***(refd)***
Malayan Banking Bhd. v. P.K. Rajamani [1994] 1 MLJ 405 ***(refd)***
United General Insurance v. Progress Credit Sdn. Bhd. [1988] 2 MLJ 297 ***(refd)***

Other sources referred to:
Principle of Administrative Law by M.P. Jain and S.N. Jain, 4th Edn.
Indian Contract and Specific Relief Acts, Pollock & Mulla, 10th Edn.

For the appellant - K.S. Narayanan (Muhammad Shafee Abdullah & G.G. Oh with him); M/s Shafee & Co.
For the respondent - Mathi Nagayam (Wan Haron b. Wan Hassan with him); M/s Wan Haron, Sukri & Nordin

JUDGMENT

Hj. Lamin bin Hj. Mohd. Yunus PCA:

The appellant/plaintiff and the respondent/defendant entered into an agreement dated 24 December 1981 (hereinafter referred to as the "main agreement") whereby the appellant/plaintiff, formerly known as Perkayuan OTP Sdn. Bhd. and referred to in the agreement as "the Logger" was given the rights and privileges to carry out logging in a timber concession of approximately 40,000 acres of forest land in the area situated in the Daerah of Nanggiri in the Jajahan Ulu Kelantan. The timber expected to be felled, logged and removed shall be of all usable tree species and subject to such conditions as imposed by the Director of Forestry, Kelantan or his agent as specified in the licence. This main agreement stipulates the date on which the appellant/plaintiff was to commence logging operations and the various payments it has to make to the Government of Kelantan in the form of royalty and premium. It has also to pay the respondents a tribute on all timber felled and extracted from the concession area at the rate of RM15/- per ton or 10% of the prevailing average quarterly timber price per ton.

By another agreement dated 24 May 1988 entered into between the appellant/plaintiff and Syarikat Kempadang Bersatu Sdn. Bhd., (hereinafter referred to as the 2nd agreement, otherwise the Kempadang agreement) the appellant/plaintiff engaged the Syarikat Kempadang Bersatu Sdn. Bhd. as a contractor "to fell log and remove timber from the contract area" subject to the terms and conditions therein contained.

By a letter of 26 October 1988 solicitors for the respondent/defendant served a notice alleging that the appellant/plaintiff had committed breaches of the main agreement namely:

(i) That you OTP Sdn Bhd did assign and/or transfer the main agreement and/or your rights therein to OKS No. 2 Sdn Bhd without the written consent of KSEDC in breach of clause 18 of the main agreement.

(ii) That you OTP Sdn Bhd and/or OKS No. 2 Sdn Bhd have on various occasions assigned, leased, sub-let and/or transferred your rights under the main agreement to 3rd parties without the written consent of KSEDC in breach of clause 18 of the main agreement.

(iii) That you OKS No. 2 Sdn Bhd have misrepresented to Y.A.B. Datuk Menteri Besar, Kelantan *vide* your letter dated 28 September 1988 that you entered into an agreement with Kempadang Bersatu Sdn Bhd of 1127A, Jalan Pengkalan Chepa, 15400 Kota Bharu, Kelantan dated 3 April 1987 and that the agreement was cancelled *vide* statutory declaration of Rusli bin Bakar, a director of Kempadang Bersatu Sdn Bhd dated 18 March 1988.

(iv) That there is a subsisting agreement between OKS No. 2 Sdn Bhd and Syarikat Kempadang Bersatu Sdn Bhd of No. 61, Jalan Besar, 18300 Gua Musang, Kelantan dated 24 May 1988 giving away your rights under the main agreement to Syarikat Kempadang Bersatu Sdn Bhd again without the written consent of KSEDC.

By that said notice, the appellant/plaintiff was required to remedy those breaches of the terms of the main agreement within two weeks from the date of the receipt of the notice and failure to do so the respondent/defendant would terminate the main agreement in compliance with clause 21 of the said agreement. For ease of reference I repeat here the two relevant clauses of the main agreement which read:

18. The logger shall not assign, lease, sub-let or transfer the whole or any part of its rights under this Agreement to any company or to any other person or persons whomsoever without first obtaining the written consent of the corporation.

21. Without prejudice to any other remedies the corporation may have against the logger, the corporation shall have the right at any time by giving notice in writing to the logger, to terminate this agreement forthwith upon the logger failing to remedy within 2 weeks of being required in writing so to do by the corporation any breach of terms and conditions contained in this agreement.

By its letter of 5 November 1988 the appellant/plaintiff through its solicitors flatly denied all those allegations. As was apparent from its letter in reply dated 16 November 1988 the denial was not well received by the respondent/defendant and commented that even its last complaint or allegation had not been addressed to. So on its instruction, its solicitors sent a notice dated 12 December 1988 to the appellant/plaintiff terminating the main agreement of 24 December 1981.

We will now deal with all the allegations one after another.

Allegation (i)

We find no reason to depart from the finding of the learned Judge below and in the face of section 23(6) of the Companies Act 1965 and the certificate of incorporation on change of name of company issued by the registrar of companies on 2 April 1985, clause 18 of the main agreement has become nugatory and irrelevant. The change in name therefore does not affect the entity of the company.

Allegation (ii)

The appellant/plaintiff took up the subject of notice which it contended as being inadequate on the ground that the particulars set out therein were unspecific, ambiguous and vague. The allegations must be sufficiently particularised so as to enable a party upon whom the notice is served whether to admit or to deny any or all of them. Such a vague notice is no notice in law. A number of authorities were cited before us. In the case of *State of Uttar Pradesh & Ors. v. Salig Ram Sharma* AIR [1960] All 543, the Court dismissed the appeal against the order of Mr. Justice S.K. Verma below who quashed the order of dismissal made by the Inspector-General of Prisons, Uttar Pradesh against the respondent, an assistant jailor. The respondent was charged with altering certain enteries in an indent pertaining to the quantity of iron sheets and that he did so "with ulterior motives". Mr. Justice Dharan said that that was "much too vague" and went on to say:

> In our view it is not enough to charge a government servant with having done an act "with ulterior motives"; he must be told what precisely is the motive attributed to him, otherwise he would not be in a position to rebut the accusation.

The case of *Sinha Govindji v. Deputy Controller of Imports* [1962] 1 SCJ 93 concerned a notice served on the holder (the petitioner) of two import licences informing him that the Ministry of Commerce and Industry proposed to cancel the two licences in the exercise of its powers under clause 9 of the Imports (Control) Order 1955 but without specifying the grounds on which action was proposed to be taken. Clause 9 lays down at least four grounds by which an action to cancel an import licence may be taken. There was no response from the authority to the petitioner's initiatives seeking clarification as regards grounds for its proposed action, and instead he received two orders from the Ministry cancelling the two licences. Also the two orders themselves failed to state on what ground they were cancelled. It was quite obvious that there was no way for the petitioner to show cause why his licences ought not to be cancelled because there were no specific charges for him to answer. The notice was no notice as he was deprived of the opportunity of being heard. The Supreme Court also quashed the two cancellation orders for being bad.

In a similar situation, in Malaysia the rule of natural Justice is also implied as is reflected in the decision of the Supreme Court in the case of *Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd.* [1988] 2 MLJ 226 where Salleh Abas, LP (delivering the judgment of the court) said: (para. D, page 231):

> But before making any such decision one way or the other, the principle of fairness and prudent administration requires him to inform the licensee that his licence would be cancelled unless he can show an acceptable reason why it should not be regarded as invalid and therefore cancelled.

To further illustrate the legal position against insufficient notice, learned Counsel for the appellant/plaintiff cited the English case of *Gregory v. Serle* [1898] 1 Ch. 652 where it was adjudged that a notice served by a lessor on his lessee merely informing the lessee that he "has not kept the said premises well sufficiently repaired and the party and other walls thereof" was not sufficient as it did not direct the attention of the lessee to the particular breaches complained of so as to give him an opportunity of remedying them before an action was brought against him. Also it was submitted that by merely parrotting the language of the contract, and in the present case it was clause 18 of the main agreement without giving any facts or other particulars, it was therefore insufficient and inadequate. It was cited to us a text book authority from **"Principle of Administrative Law"** by M.P. Jain and S.N. Jain, 4th Ed.

> A notice must be adequate. A notice in barebones language of the statute I.e. which merely repeats the statutory language without giving any facts and other particulars, is insufficient and adequate. Further, the grounds given in the notice on which the action is proposed to be taken should be clear, specific and unambiguous. If these conditions are not satisfied the person cannot be said to have a reasonable opportunity of being heard. Such a notice is no notice.

We agree that the "various occasions" on which the appellant/plaintiff was alleged to have assigned and/or transferred its rights to third parties lacked details. The identity of the third parties to whom the rights were allegedly assigned and/or transferred was not particularised.

We agree with the submission of the learned Counsel for the appellant/plaintiff and accordingly allegation (ii) must fail.

Allegation (iii)

We agree with the learned Judge below that there is no merit in this allegation. Suffice for us to quote that part of his Judgment which states:

> Looking through the main Agreement I find no provision which envisages or requires either party to keep the Menteri Besar posted of any progress or development of the logging activities as carried out under the agreement. It cannot therefore be disputed that any representation or for that matter any misrepresentation by a party to the Menteri Besar would entitle the other party to any right of terminationor treat it as a breach towards securing the termination of the Main Agreement, since it is a matter relatively foreign to what had been contemplated by both parties at the material time.

We must add that after reading the letter of 28 September 1988 addressed to YAB Menteri Besar, we find it difficult to accept that there is contained in it an element of misrepresentation. It states nothing but facts and the truth. It admits that there was an agreement entered into between Kempadang Bersatu Sdn. Bhd. (hereinafter referred to as "Kempadang") and POKS(2) on 3 April 1987 but subsequently terminated for reason of inability on the part of Kempadang to honour its side of the bargain and this is evidenced by the Statutory Declaration of 18

March 1988. In the notice of 26 October 1988 from the solicitors of the Kelantan State Economic Development Corporation (KSEDC), there is not even the faintest suggestion as to how the misrepresentation came about or what in fact that was being misrepresented. (See item 4 in the notice). No more need be said.

Allegation (iv)

We observe that from the grounds of judgment, the learned Judge below found that the agreement of 24 May 1988 entered into between the appellant/plaintiff and Kempadang was a grant of assignment by the appellant/ plaintiff to Kempadang without adequate examination of the terms of the agreement. He merely said:

> If on reading the agreement the inevitable conclusion is that it in substance, confers on Kempadang the rights and obligations of the assignee and on the plaintiffs the rights and obligations of the assignors then the agreement must be construed as an agreement to assign the plaintiffs' rights and obligations irrespective of whatever label that may have been given - see *Malayan Banking Bhd. v. P.K. Rajamani* Supreme Court Civil Appeal No. 02-181-1992 (yet to be reported). Having considered the nature and substance of the said agreement I am of the view that it is a camouflage by the plaintiffs as not to be seen offending against the prohibition of assignment or transfer of their rights under the main agreement. Accordingly I hold that the agreement is in fact a grant of assignment by the plaintiffs to Kempadang.

(Note: The case of *Malayan Banking Bhd. v. P.K. Rajamani* has now been reported in [1994] 1 MLJ 405).

Upon examination of all the relevant provisions of the 2nd agreement of 24 May 1988, we are compelled to depart from the finding of the learned Judge below. From the preamble in paragraphs (b) and (c) there is there stated the first indication as to the real intention of the parties. Because OKS No. 2 (the appellant/plaintiff) "Is desirous of felling, logging and removing timber from that portion of the Concession Area", OKS No. 2 "had agreed to engage" the contractor (Kempadang) to do the work subject to the terms and conditions contained in the agreement. The appellant/plaintiff agreed only "to engage" Kempadang. To engage is to employ or to secure for service. By clause 1 of the said agreement, the Contractor "agrees to fell ..." the timber "subject to the reasonable satisfaction of OKS No. 2 and in conformity with all the reasonable directions and requirements of OKS No. 2 and.....". Upon being engaged to do the work, the contractor did not have a free hand to work the concession area. Kempadang not only must satisfy the appellant/plaintiff, it must also comply with all the directions and requirements issued by the appellant/plaintiff. To carry out the work with such conditions attached cannot be the result of an assignment. In any agreement of this kind, provisions as to indemnity there must be. (See clause 3(b)). By clause 8, the contractor is obliged to have the policies of insurance together with the receipts of premium paid ready at any reasonable time for inspection by the appellant/plaintiff. The appellant/plaintiff is entitled to terminate the "employment of the contractor" if "he fails to observe or perform and comply" with any of the provisions of this agreement or the main agreement. (clause 10(ii)).

According to the learned Judge below the agreement makes no mention about payment of money to Kempadang for the services rendered by them as is normally expected of in a contract for services. Under clause 6 of the 2nd agreement, the contractor is entitled to sell all the timber that he fell and that proceeds are to be distributed monthly. 10% of the proceeds is to be paid to the Kelantan SEDC as tribute. The State Government shall receive all royalties and premium due. Out of the proceeds the contractor will also pay all "other operational expenses". Such expenses will certainly include the yearly payment for licence

fees. (The term of a licence to extract timber is for twelve months under section 21 of the National Forestry Act 1984). Under the main contract or agreement the appellant/plaintiff, being the logger, had to make similar payments. In return for the grant of rights and privileges to work the whole concession area under clause 2 of the main agreement, the logger "shall pay" the Kelantan SEDC a tribute on all timber felled and extracted "at the rate of RM15 (Ringgit fifteen only) per ton or 10% of the prevailing average quarterly timber price per ton" whichever is greater and it became due and owing monthly. By clause 6 of the 2nd agreement, it became the responsibillty of the contractor and no more that of the logger for the contractor was then "to pay direct" to the SEDC by way of tribute "10% of all the timber sold at prevailing local market price." (clause 6(2)). Similarly with regard to royalties and premium the logger was obliged to pay the state government by virtue of clauses 10 and 11 of the main agreement. This responsibility shifted to the contractor as injuncted by clause 6(3) of the 2nd agreement. At this point we wish to note that it is the logger who paid the security deposit of RM80,000/- to the SEDC as required by clause 1(2) of the main agreement which would be refunded to the logger at the expiry of the agreement. There is no mention of this in the 2nd agreement. With the security deposit still remaining in the name of the logger, by implication therefore the logging operations would continue to be in the name and accordingly the responsibility of the logger. The deposit was to secure the performance of the main agreement. The effect of clause 12 of the 2nd agreement would be that the 2nd agreement would continue to subsist for so long as the main agreement remained in force. Should the contractor commit a default under clause 10 of the 2nd agreement, his "employment" could summarily be terminated by the logger. In other words while the 2nd agreement ceases to be in force the main agreement will continue to operate. On the other hand the moment the main agreement expires or is terminated, the 2nd agreement ceases to operate. This is another indicator that the logging operations were sub-contracted to the contractor.

The contractor under the Kempadang agreement was to fell, extract and to sell the timber and was to make all the payments to both the corporation and the state government. In view of the absence of further direction in either of the two agreements as to how the balance of the proceeds for the month was to be disbursed, it would appear to us (but without deciding the point) that the remainder must be handed over to the logger. This would seem to be consistent with the 2nd agreement being in the nature of a sub-contract. However in a similar type of sub-contract it is not unusual to spell out in the contract itself the arrangement or formula pertaining to the entitlement of the parties to the contract on the proceeds from the concession area. It would be no surprise that in the present case, some private arrangement had been agreed to with regard to the entitlement of parties on the balance of the proceeds for in the logging business especially it can safely be assumed that no services are rendered gratis. The question that we have to ascertain is in regard to the nature of the 2nd agreement; whether it is an assignment or a sub-contract. Learned counsel for the appellant/plaintiff cited **Pollock & Mulla on Indian Contract and Specific Relief Acts**, 10th Ed. in support of his contention as to what can be assigned and what cannot. At p. 380 it states:

> Assignment of contracts - Broadly speaking, the benefit of a contract can be assigned, but not the burden, subject to the same exception of strictly personal contracts that has been mentioned as affecting the powers and duties of executors. The principles were thus stated by the Court of Appeal in England:
>
> > Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee.

> A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor..... On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned.....

Under the 2nd agreement the contractor agreed to submit to the dictates of the logger (the appellant/plaintiff). For example the contractor agreed to abide with "all reasonable directions and requirements of" the appellant/plaintiff when felling and removing the timber and that they must be performed to the satisfaction of the appellant/plaintiff (clause 1). Clause 2 of the 2nd agreement stipulates that the contractor "shall be deemed to have notice of all the provisions of the main contract". Of course the main contract or agreement contains both the rights and liabilities of parties to the contract. Clause 2 is not to stay as a wall-flower but to emphasise in particular the provisions relating to the burden or liabilities must be given serious attention by the contractor requiring proper compliance. This peremptory demand is further spelt out for example in clauses 3, 6 and 10. Under clause 3(b), the contractor is required to "observe, perform and comply with all the provisions of the main contract etc...". While clause 3(b) is the usual indemnity provision for breaches and non-observance by the contractor's servants and agents, clause 6 spells out the contractor's obligation to make all the necessary payments similarly required of the logger (appellant/plaintiff)under the main agreement. For failure "to observe or perform and comply- with any of the provisions in either of the two agreements relating to the felling, logging and removing of timber, under clause 10, the contractor's employment or services may be terminated. To gather the true intention of parties in a contract or an agreement, every provision of the agreement must be examined. In the case before us, the learned Judge below did say that in order to ascertain whether the agreement of 24 May 1988 was in effect a contract to appoint contractors or in reality a grant of assignment to Kempadang "the court has to look to the substance rather than the words." That was exactly the approach enunciated by the Supreme Court in *P.K. Rajamani*'s case in order to determine the real issue before the Court namely whether the facility given in the letter of 7 March 1986 was a, "new" facility or a continuing facility secured by the then existing charges. Having adopted that same approach the learned Judge below however immediately concluded that "in substance" the Kempadang agreement conferred on Kempadang "the rights and obligations" of the assignees and on the plaintiff the rights and obligations of the assignors and therefore the agreement must be construed as a grant of assignment by the plaintiffs to Kempadang without giving us the privilege of following his mental reasoning for coming to that conclusion. As we have said we disagree with the learned Judge's conclusion.

Now for an assignment under clause 18 of the main agreement to be effective prior written consent must first be obtained from the corporation (the respondent/defendant): *United General Insurance v. Progress Credit Sdn. Bhd.* [1988] 2 MLJ 297. The question that has been asked is whether the 2nd agreement has breached the said clause 18. The short answer is no it has not for the reason that the 2nd agreement is a sub-contract and not an assignment and that sub-contract is excluded from the terms of clause 18.

For the above reasons we are therefore of the view that that allegation (iv) must also fail. This appeal accordingly must be allowed and we therefore allow the appeal on the following terms.

(a) As we have found that the notice of 12 December 1988 to terminate the main agreement was bad in law and therefore the termination was null and void and of no effect.

(b) In the amended statement of claim it was alleged in paragraph 10(vi), the Kempadang agreement of 24 May 1988 was never acted upon and no application for any logging was made for Kempadang to do logging. To this there was only a plain denial as a defence with no particulars provided. However on 5 September 1993, for the purpose of the disposal of this case both parties agreed not to submit oral evidence. In the circumstances, the allegation in paragraph 10(vi) in the amended statement of claim must stand. The main agreement refers to a concession area of approximately 40,000 acres. But it is not disputed that 10,000 acres have already been cut by 1988 leaving an area of 30,000 acres which infact is the total acreage for concession area referred to in the Kempadang agreement of 24 May 1988. We therefore order the respondent/defendant to provide the appellant/plaintiff for logging the full remaining 30,000 acres of timber concession under the main agreement.

The appellant/plaintiff further alleged in its submission that there had been pilferage or illegal logging in the concession area of 30,000 acres despite the injunction obtained by the appellant/ plaintiff on 8 January 1989 and therefore asked for replacement. As it is not clear whether a survey has been made as to the amount of illegal logging involved, we therefore do not propose to make any order on replacement or even damages.

(c) Costs of the appeal.

(d) Deposit to be refunded to the appellant.